Judgment will accordingly be entered for the plaintiff as claimed with costs.

Judgment for the plaintiff.

Solicitors: *D. G. Ironside; Lee & Lee.*

M. S. ALLY & CO. LTD. v. CALHAEM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) September 3, 1964]

[K.L. — Federal Court Civil Appeal No. 34 of 1964]

Damages — Wrongful attachment — Whether person wrongfully attached could claim damages.

In this appeal the Federal Court reversed the judgment in *Calhaem* v. *M. S. Ally & Co. Ltd.* [1964] M.L.J. 289 and allowed the appeal with costs on the ground that the statement of claim was bad and disclosed no cause of action.

Editorial Note: The Honourable Lord President delivered an oral judgment and we have been informed by his Lordship's secretary that there was no recorded judgment. We understand from counsel for the appellant that the following authorities and cases were cited in argument:— (1) *Sarkar's* Code of Civil Procedure (8th Edition) Vol. 1; (2) *Halsbury* (3rd Edition) Vol. 38 p. 574; (3) *Halsbury* (3rd Edition) Vol. 2 p. 166; (4) *Blay* v. *Pollard* [1930] 1 K.B. 634; (5) *Churchill* v. *Siggers* 118 E.R. 1389; (6) *De Medina* v. *Grove* 116 E.R. 67; (7) *Davies* v. *Jenkins* 152 E.R. 1005; (8) *Phillips* v. *General Omnibus Co.* (1880) 50 L.J.Q.B. 112; (9) *Huffer* v. *Allen* (1866) 15 L.T. 225; L.R. (1866) 2 Exch. 15; (10) *Kepong Prospecting Co. Ltd.* v. *Schmidt* [1962] M.L.J. 375; (11) *Manjappa Chettiar* v. *Ganapathi* I.L.R. 35 Mad. 589; (12) *Clissold* v. *Cratchley* [1910] 2 K.B. 244; (13) *Foley* v. *Hill* (1848) 2 H.L.C. 28; (14) *Joachinson* v. *Swiss Bank* [1921] 3 K.B. 110; (15) *Re Thynne* [1911] 1 Ch. 282; (16) *Marshall* v. *James* [1905] 1 Ch. 432.

FEDERAL COURT.

Peter Mooney for the appellants.

A. D. Rajah for the respondent.

Solicitors: *Skrine & Co.; Lovelace & Hastings.*

YEOW FOOK YUEN & ANOR. v. REGINA

[A.Cr.J. (Wee Chong Jin C.J.) November 25, 1964]

[Singapore — Magistrate's Appeal No. 43 of 1963]

Penal Code, ss 24, 109, 406 and 408 — Misappropriation of union funds — Acted "dishonestly" — What amounts to — Abetment — Criminal breach of trust.

Criminal Procedure — Charge — Alteration — Recall of witness — Criminal Procedure Code (Cap. 132), s. 160.

The first appellant, the honorary treasurer of a trade union was charged with two charges of wilfully suffering the second appellant, the general-secretary of the union, to dishonestly misappropriate two sums amounting to $7,500 from the funds of the union contrary to section 406 of the Penal Code. The 2nd appellant was charged with abetment of the offence contrary to sections 109 and 406 of the Penal Code. The main defence of both appellants was that the sum of $7,500 was taken by the 2nd appellant by way of loan or loans from time to time, and that although these loans were taken without prior approval, they were approved by the executive council of the union at a later date.

After the prosecution had closed its case the trial judge, having formed the view that both appellants had a case to answer on criminal breach of trust simpliciter and abetment thereof on the ground that the 1st appellant was not a servant in the employ of the union and therefore not a servant within the meaning of section 408 of the Penal Code, amended the charges against the appellants who then claimed trial on the amended charges. Before the trial judge called upon the appellants to enter upon their defence, counsel for the appellants applied to recall the main prosecution witness and his purpose for so doing was "to show that this witness has been coached. He has motive to implicate the second accused". The application was disallowed on the ground that it was not consequential upon and had no reference to the charges as amended and therefore he could not recall the witness for that purpose at that stage but could do so later when the two appellants made their defence.

Held: (1) on the facts before the district court there was ample evidence to support a finding that both appellants acted "dishonestly" within the meaning of section 24 of the Penal Code;

(2) the trial judge was right in rejecting the application to recall the witness as the appellants had no absolute right under section 160 of the Criminal Procedure Code to recall and examine a witness where the purpose of that application had no reference to the altered charges;

(3) the trial judge was correct in rejecting the defence contention that the approval given by the executive council subsequent to the taking of the money and at a time when the police were already investigating the matter afforded a complete defence in law in respect of the charges;

(4) taking all the factors and the observations of the trial judge into consideration, the sentences of both appellants should be varied from imprisonment to a fine on each charge.

Cases referred to:—

(1) *Nagendra Nath Sen* v. *Emperor* A.I.R. 1932 Cal. 486.

(2) *Ong Boon Siang & Ors.* v. *Regina* [1961] M.L.J. 4.

MAGISTRATE'S CRIMINAL APPEAL.

T. T. Rajah for the appellants.

Francis T. Seow (Senior Crown Counsel) for the respondents.

Wee Chong Jin C.J.: The first appellant is appealing against his conviction by the First Criminal District Judge on the following two charges:—

First Charge:

"You, Yeow Fook Yuen, the Honorary Treasurer of the Singapore Harbour Board Staff Association, Old Clubhouse, Cantonment Road, Singapore, are charged that you, between the 28th day of February, 1961 and the 30th day of December, 1961, at Singapore, being the Treasurer of the aforesaid Singapore Harbour Board Staff Association, and in such capacity entrusted with dominion over property, to wit, the aforesaid Singapore Harbour Board Staff Association funds, wilfully suffered one Jamit Singh, the General-Secretary of the aforesaid Singapore Harbour Board Staff Association, to dishonestly misappropriate the sum of Dollars Three Thousand and five hundred ($3,500) from the aforesaid funds and you have thereby committed an offence

punishable under section 406 of the Penal Code, Chapter 119".

Second Charge:

"You, Yeow Fook Yuen, the Honorary Treasurer of the Singapore Harbour Board Staff Association, Old Clubhouse, Cantonment Road, Singapore, are charged that you, between the 31st day of January, 1962 and the 31st day of August, 1962, at Singapore, being the Treasurer of the aforesaid Singapore Harbour Board Staff Association, and in such capacity entrusted with dominion over property, to wit, the aforesaid Singapore Harbour Board Staff Association funds, wilfully suffered one Jamit Singh, the General-Secretary of the aforesaid Singapore Harbour Board Staff Association to dishonestly misappropriate the sum of Dollars Four Thousand ($4,000) from the aforesaid funds and you have thereby committed an offence punishable under section 406 of the Penal Code, Chapter 119".

He was sentenced to 9 months' imprisonment on each charge the sentences to run concurrently.

The second appellant is appealing against his conviction on the following two charges:—

First Charge:

"You, Jamit Singh, the General-Secretary of the Singapore Harbour Board Staff Association, Old Clubhouse, Cantonment Road, Singapore, are charged that you, between the 28th day of February, 1961 and the 30th day of December, 1961, at Singapore, abetted the commission of the offence of criminal breach of trust of funds amounting to Dollars Three Thousand and five hundred ($3,500) by one Yeow Fook Yuen, the Honorary Treasurer of the aforesaid Singapore Harbour Board Staff Association, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under sections 109 and 406 of the Penal Code, Chapter 119".

Second Charge:

"You, Jamit Singh, the General-Secretary of the Singapore Harbour Board Staff Association, Old Clubhouse, Cantonment Road, Singapore, are charged that you, between 31st day of January, 1962 and the 31st day of August, 1962, at Singapore, abetted the commission of the offence of criminal breach of trust of funds amounting to Dollars Four Thousand ($4,000) by one Yeow Fook Yuen, the Honorary Treasurer of the aforesaid Singapore Harbour Board Staff Association, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under sections 109 and 406 of the Penal Code, Chapter 119".

He was sentenced to 18 months' imprisonment on each charge the sentences to run concurrently. Both appellants are also appealing against the sentences imposed on them.

The first appellant was at all material times the honorary treasurer of the Singapore Harbour Board Staff Association, a trade union registered under the Trade Unions Ordinance (Chapter 154). He held this office by election by the members of the union.

The second appellant was at all material times the general-secretary of this trade union and was appointed to this office by the executive council of the union. He is a paid official and received a monthly salary of $500 whereas the first appellant is an honorary official and receives an honorarium of $100 per month. By occupation the first appellant is a clerk employed by the Singapore Harbour Board, a statutory corporation. The membership of this union is approximately 10,000 all of whom are employed by the Singapore Harbour Board.

The prosecution case is and this is not in dispute, that the sum of $7,500, the subject matter of the two charges against the first appellant were funds of the union whose revenue is derived entirely from subscriptions paid monthly by its members. This sum of money, between the 28th February, 1961 and the 31st August, 1962, was taken by the second appellant in circumstances which are set out in the grounds of decision of the learned district judge as follows:—

"In the first place it is necessary to consider the manner in which this sum of $7,500 was taken by the second appellant. The revenue of the union is derived entirely from subscriptions paid by members of the union. The subscription which is payable monthly is paid either to the section collectors appointed by the union for the purpose of collecting subscriptions from members working in the various sections of the Singapore Harbour Board or it is paid by the members at the union's office at Cantonment Road directly to the treasurer, the first appellant. The first appellant, however did not go to the union's office regularly every day as he had his duties to perform as a clerk at the Harbour Board and often worked overtime late into the night. When the treasurer, the first appellant, was not at the union's office, members paid their subscription to the union's clerk, one C. T. Muthu, (P.W.14) who received the subscriptions, issued receipts and handed the money to the treasurer if he happened to turn up in the evening. If the treasurer did not turn up in the evening, Muthu used to bank the money the next day with the Hong Kong & Shanghai Bank with which the union has an account. The treasurer, the first appellant, sometimes did not go to the union's office for several days at a stretch. There was evidence before the court that the second appellant obtained money from the clerk C. T. Muthu from time to time which he acknowledged in two small private note books (Exhibits P25 and P26). The money which Muthu gave to the second appellant and receipt of which was acknowledged in the two little note books was from subscriptions collected by Muthu from members of the union. Muthu testified that whenever he gave money to the second appellant from the subscriptions that he had collected it was with the knowledge and approval of the first appellant.

Apart from receiving monies from the clerk C. T. Muthu, second appellant also received money from the first appellant during the relevant period from time to time which he acknowledged on chits of paper. It would appear that at the end of each month accounts were settled between the first appellant and the second appellant. If the second appellant had taken during the month a sum less than $500 the first appellant would give him some more money to make up $500 and would get the second appellant to sign a voucher for $500 as being salary paid to him for the month in question. In case the sums already taken during the month totalled more than $500 but less than $1,000 the first appellant would give him some more money to make up the round figure of $1,000, and the second appellant would then sign a voucher acknowledging the receipt of $500 as salary and $500 as "advance". On one occasion as much as $2,000 was taken as advance and on another $1,500 while on a third occasion $1,000 was taken as advance.

On the settling of this monthly account the chits which second appellant had signed during the month would then be destroyed, but the two little note books (Exhibits P25 and P26) were for some reason not destroyed. They remained the private property of the first appellant and were recovered by the police from his house. The official vouchers which second appellant signed do not therefore reflect the true date on which the second appellant received the money in question."

The case for the prosecution as against the first appellant was that the circumstances under which he allowed these moneys of the union to be taken by the second appellant amounted to the offence of criminal breach of trust in that he in his capacity as treasurer of the union being entrusted by the union with the funds of the union wilfully suffered the second appellant to dishonestly misappropriate this sum of $7,500 from the funds of the union. The case against the second appellant was that in the circumstances of the taking by him of this sum of $7,500 it amounted to his having abetted the commission by the first appellant of the offence of criminal breach of trust.

The main defence of both appellants was that this sum of $7,500 was taken by the second appellant by way of loan or loans from time to time, that these loans were approved by the executive council of the union.

It is clear that if the executive council of the union had given the first appellant prior authority to make advances or loans to the second appellant specifically or to any paid servant of the union generally, the prosecution must fail. The case for the prosecution is that there was no such prior authority given by the executive council of the union nor is it the case of both appellants that there was such prior authority or approval.

The case for the prosecution was that the second appellant, in between the two dates in question i.e. 28th February, 1961 and 31st August, 1962, from time to time obtained moneys, either from the first appellant or from Muthu the clerk of the union with the knowledge of the first appellant and to whom members paid their subscriptions at the union's office whenever the first appellant was not present, without the prior knowledge and approval of the executive council of the union and that it was only on the 15th October, 1962 that these so called loans or advances were specifically brought before the executive council who then gave its approval. It was also the prosecution's case that both appellants knew the first appellant had no authority from the executive council or had no authority under the rules of the union to make loans or advances to the second appellant.

The case for the defence was that the members who made up the executive council knew of the fact that the second appellant had been taking advances in this manner from time to time and that there were occasions when the executive council held its meetings when accounts were tabled before the meeting which disclosed the fact of such advances having been taken by the second appellant.

The trial judge in his long and careful judgment after setting out the case for the prosecution and the case for the defence in this issue of knowledge or approval by the executive council of the union came to the conclusion that the executive council were never informed of these so called advances or loans, never discussed them and never sanctioned the fact of their having been made until the 15th October, 1962 and in that connection accepted the evidence of Latiff a prosecution witness who was at all material times the president of the union.

With regard to the effect of the approval given by the executive council on the 15th October, 1962 when it passed a resolution at a meeting specifically called to consider the matter of the advances taken by the second appellant, the trial judge came to the conclusion "that the executive council has no power nor any authority to condone the criminal offences that had already been committed by the two appellants and which were then under investigation by the police."

Before me it is contended that on all the evidence both oral and documentary before the trial court there was clearly no dishonest intention on the part of either appellant. The trial judge has found that the first appellant had permitted the second appellant, in violation of the rules of the union and without authority from the executive council, to take the $7,500 which were moneys of the union and which should have been paid into the bank account of the union. He has also found that the first appellant did so on the instigation of the second appellant who had no lawful authority to take these moneys and convert them to his own use.

It seems to me there can be no question but that the first appellant by so permitting the second appellant to take these moneys of the union had intentionally deprived the union of the use of these moneys had thereby intentionally caused wrongful loss to the union and had intentionally caused wrongful gain to the second appellant and the second appellant by so instigating the first appellant to deprive the union of the use of these moneys was guilty of the offence of abetment. There was no evidence on behalf of either appellant that either of them held the *bona fide* belief that the first appellant was acting within the authority of his office as honorary treasurer of the union in making these advances from time to time to the second appellant and indeed the

evidence indicated, as the trial judge has found, that both appellants knew it was wrong on the part of the first appellant to allow and for the second appellant to take these advances without the prior approval of the executive council. It was urged before me that so long as both appellants regarded these moneys as advances or loans and *bona fide* believed them to be advances or loans there was no dishonest intention on the part of either of them. This argument is in my view fallacious. The real question to be decided on the issue of dishonest intention is not the question whether either appellant *bona fide* believed these takings to be loans but whether either appellant *bona fide* believed that the first appellant had lawful authority to make these loans to the second appellant. On the facts before the trial judge there was ample evidence to support his finding that both appellants acted "dishonestly" within the meaning of section 24 of the Penal Code.

It was next contended that the approval given by the executive council on the 15th October, 1962 after these advances or loans was a valid and effective approval and afforded a complete defence in law in respect of the present charges. Counsel for the appellants was however unable to draw my attention to any authority in support of his contention and I need only say that in my opinion the trial judge was correct in rejecting this defence contention.

Next it was contended that the trial judge was wrong in law to refuse an application by the defence counsel to recall the main prosecution witness at the close of the case for the prosecution and after the court had altered the original charges on the ground that the right to recall a witness in such circumstances was an absolute right under section 160 of the Criminal Procedure Code.

The application to recall this witness arose under these circumstances. After the prosecution had closed its case the trial judge, having formed the view that both appellants had a case to answer on criminal breach of trust simpliciter and abetment thereof on the ground that the first appellant was not a servant in the employ of the union and therefore not a servant within the meaning of section 408 of the Penal Code, amended the charges against the appellants who then claimed trial on the amended charges. Before the trial judge called upon the appellants to enter upon their defence, counsel for the appellants applied to recall this witness and on being asked for what purpose he wished to recall the witness replied: "To show that this witness has been coached. He has motive to implicate the second accused". The trial judge then disallowed this application on the ground that it was not consequential upon and had no reference to the charges as amended and therefore he could not recall the witness for that purpose at that stage but could do so later when the two appellants made their defence.

Counsel for the appellants relied on two cases, one an Indian decision, the other a decision of this court.

In the Indian case of *Nagendra Nath Sen*, v. *Emperor* [1] it was held where the magistrate, after the conclusion of the trial and before delivery of judgment, made an alteration in the charge had refused a petition by the accused asking for certain witnesses to be called for cross-examination, such a refusal was a violation of the terms of section 231 of the Indian Criminal Procedure Code which is a mandatory section and that therefore the trial was vitiated.

In my opinion the Indian decision is clearly distinguishable. In the present case the trial judge had ascertained from the defence counsel that the application to recall the witness was for a purpose other than with reference to the altered charges.

In the Indian case it would appear that the refusal by the magistrate was made without first enquiring into the reason for the application and the case is therefore in my opinion no authority for the proposition that whenever the court alters a charge after the commencement of the trial an accused person has an absolute right to recall and examine a witness.

The other decision relied on is the case of *Ong Boon Siang & Others* v. *Regina*.[2] That case is again clearly distinguishable as it deals with an application by an accused person to recall a witness while he is making his defence. In the present case no such application was made while the appellants were making their defences. It follows that the trial judge was right in rejecting the application and that the appellants had no absolute right under section 160 to recall and examine a witness where the purpose of the application had no reference to the altered charges.

Counsel for the appellants put forward other grounds of appeal which in my view are without any substance whatsoever. They have been dealt with fully and in my opinion correctly by the trial judge in his long and careful judgment. In any event even if sustainable they are not sufficient to warrant the convictions being set aside. The evidence against both appellants on the charges as amended was, on the record before me, overwhelming.

There remains the question of sentence. It seems to me clear, and this accords with the view held by the trial judge, that the first appellant had acted throughout foolishly and was

to a considerable extent acting under the influence of the second appellant. He did not benefit in any way, financially or otherwise, from these misappropriations and it seems probable that had he gone to the executive council of the union for authority before making these advances or loans to the second appellant the requisite authority would have been forthcoming. Taking all these factors into consideration I think justice would be served if a fine only is imposed on him. I accordingly dismiss his appeal against his convictions on the two charges against him but set aside the sentences of imprisonment and substitute instead a fine of $1,000 in respect of each charge.

So far as the second appellant is concerned the question of sentence presents more difficulty. The trial judge has found that he has rendered useful services to the Singapore Harbour Board Staff Association and is a very able trade union leader. He has when the association was in lean times helped it financially by not drawing his salary for a period of seven months. He has also made full restitution before the trial commenced.

Taking all these factors into consideration and in the particular circumstances of the case and after very anxious consideration I am of the opinion that the interests of justice will be served if I err on the side of mercy and leniency. I will therefore dismiss his appeal against conviction but will set aside the sentences of imprisonment and substitute therefor a fine of $1,500 in respect of the 1st charge and a fine of $2,000 in respect of the second charge.

Convictions confirmed. Sentences of imprisonment set aside. Fines imposed.

SIBU URBAN DISTRICT COUNCIL v. LING KIM CHING

[O.C.J. (Lee Hun Hoe J.C.) December 1, 1964]

[Sibu — Civil Suit No. CS/66/64]

Contract — Agreement to run a canteen — Whether agreement created a licence or a tenancy — Determination.

Landlord and Tenant — Licence — Protection of Rent Control Ordinance.

The plaintiff and the defendant entered into an agreement whereby the plaintiff allowed the defendant to run a canteen at a swimming pool for a period of twelve months. The canteen was run in the plaintiff's premises. Subsequently it appeared that the defendant failed to pay the rent and the plaintiff terminated the agreement by giving a month's notice.

Held: (1) the agreement created a licence and not a tenancy and as this had been properly terminated, the defendant should be asked to give up possession of the premises;

(2) even if the agreement created a tenancy the defendant could not claim the protection of the Rent Control Ordinance as the agreement was outside the ambit of the Ordinance.

Cases referred to:—

(1) *Chin Chak* v. *Fan Kee alias Tan Kee Chung* [1958] S.C.R. 121.

(2) *Brooker* v. *Palmer* [1942] 2 All E.R. 674.

CIVIL SUIT.

Secretary of Sibu Urban District Council for the plaintiff.

Defendant in person.

Lee Hun Hoe J.C.: Plaintiff is the Sibu Urban District Council, a corporate body constituted under the provisions of the Local Authority (Sibu Urban District Council) Order 1957 (see G.N.L. 97 of 1957). The Local Authority (Sibu Urban District Council) Order which came into operation on the 1st July 1963 and published in the Laws of Sarawak 1963, volume XI, is a modified version of G.N.L. 97 of 1957 (as amended by G.N.L. 60 and L. 110 of 1959).

Plaintiff and defendant entered into an agreement whereby plaintiff allowed the defendant to run a canteen at the Bukit Lima Swimming Pool, Sibu for a period of 12 months i.e. from 16th November, 1963 to 15th November, 1964. The agreement was registered as Sibu Deed No. 477/63. The agreement was subjected to the following terms and conditions:—

"(a) The canteen shall be run in the temporary canteen building to be erected by the council for the 1st approximately six months and when the proper canteen building is completed the contractor shall move into the permanent building for the 2nd six months.

(b) Before signing this agreement, the contractor shall pay to the council a quarterly rental ($480.00) in advance within 7 days of each quarter during the period of this agreement. No refund shall be made if the contractor does not wish to continue running the canteen.

(c) The contractor shall operate the canteen in accordance with all the health requirements as directed by the council and shall take out separate licence on payment of the appropriate fee if he wishes to trade in food or other goods as well as for the canteen.

(d) The contractor shall not assign or sublet either wholly or in part the undertaking of this agreement without the prior consent in writing of the chairman of the council.

(e) The contractor shall be responsible to pay the water rate and electric lighting charges, but the capital cost of installation of water and lights will be borne by council.

(f) The contractor shall provide his own refrigerator, sufficient tables and chairs, utensils and kitchen equipment for the running of the canteen. An extra five cents to ten cents higher than the price in the town be allowed. The contractor shall submit a price list to the council for approval. The council reserves the right to fix prices of food and drink if necessary.

(g) The contractor shall run the business daily on week days from 2 p.m. to 9 p.m. and Sundays and public holidays from 8 a.m. to 9 p.m. and such time as approved by the council.